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No. 91-200

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN AND
MARTIN ROCHMAN

Petitioners

- v. -

THE STATE OF NEW HAMPSHIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners Robert Richards, Edward Kaufman and Martin Rochman ("RKR") hereby reply to the brief submitted by Respondents Northeast Utilities Service Company ("NUSCO") and Public Service Company of New Hampshire ("PSNH") and the brief submitted by the State of New Hampshire (the "State").

DISCUSSION

I. THE QUESTION OF WHETHER RKR HAS STANDING IS A FEDERAL QUESTION.

NUSCO claims that RKR's petition does not present a federal question. It claims the question of whether stockholders of a public utility have standing to challenge a state regulatory decision in a state court is purely a matter of state law.

But RKR of course are not asking simply whether stockholders of a public

utility have standing to complain about a rate decision. RKR are asking whether stockholders of a public utility that is in Chapter 11 can complain about a rate decision that they claim confiscates the property of the public utility and destroys the wealth of its stockholders in violation of the U.S. Constitution.

This Court has said that the "first place one must look to determine the powers of corporate directors is in the relevant State's corporation law" but it has also said that that is not the only place one must look and not even the last place. Indeed, it has specifically said that a state rule with regard to corporate governance will not be respected if its application is inconsistent with the federal policy underlying the cause of action. Kamien v. Kemper Financial Services, Inc. 111 S. Ct. 1711, 1718 (1991).

It has also said that "when a federal

statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation . . . are federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." Burks v. Lasker 441 U.S. 471, 476 (1979).

On the face of it, NUSCO is advancing a rather remarkable proposition. RKR are claiming that the State has violated the Constitution and yet NUSCO would have this Court hold that the State, either by court rule or statute, can finally determine who can complain about that wrong. This Court may in the end agree with the Supreme Court of New Hampshire that RKR does not have standing, but it would be absurd to hold that the question of who can complain about a violation of the Constitution is a state question.

RKR would also submit that the nation has a special interest in protecting

investors in the nation's utilities.

A utility is a special kind of corporation. It is not like other corporations that are created by private individuals for the purpose of doing business for a profit and therefore who arguably agree to abide by the rules of corporate governance established by the state of incorporation. A utility is created pursuant to special statutory by residents of the state to serve the people of the state.

The stockholders are theoretically the owners of the utility and have the power to choose their directors and determine the policy of the corporation but as a practical matter they have no real control over either management or company policy. The stockholders are so numerous it would be impossible as a practical matter for them to replace management no matter how badly it performs. And the

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utility is obliged to serve the public in accordance with the rules and regulations of its regulators no matter how badly it is treated by the state. The stockholders are not viewed by either management or the state so much as owners of the corporation as sources of capital. They are not paid "profits" but a return that is said to reflect the utility's "cost" of capital.

And finally, management generally are residents of the service territory and as such are undoubtedly concerned about the welfare of their fellow residents and the economy of their service territory and perhaps more concerned about them than the welfare of the stockholders, many of whom and in the case of the utility in a small state like New Hampshire, perhaps most of whom, may live in other states.

Since a utility is so dominated by

parochial interests, it would not be a very attractive investment if the state did not assure investors that there investments would be treated fairly. Ever since FPC v. Hope Natural Gas 320 U.S. 591 (1944), the states have generally by statute or commission and court decision given the investors that assurance by promising that the utility will be allowed to recover the original cost of their prudent investments in their facilities. In form, the promise is to the utility but in effect it is to the stockholders because the utility must serve in any event.

Because the states must make that promise in order for the utilities to raise capital from non-residents, RKR submits that the nation has a special interest in making certain that the states keep that promise and that the stockholders should therefore have as a

matter of federal law standing to challenge a rate decision in state court and before this Court, if and when that is necessary, to make sure that management holds the state to its promise.

But of course PSNH is not an ordinary utility. It has filed in Chapter 11 to seek federal protection from its creditors and presumably anyone else that might want to destroy it. Even if this Court believed it was appropriate, in normal circumstances, in the interest perhaps of expediting rate proceedings, to require stockholders to rely on the business judgment of management, it is surely not appropriate once the utility is forced by regulation to seek the protection of the Bankruptcy Court.

Chapter 11 assumes that management's judgement is deficient. It assumes that management has failed to protect the estate and may continue to do so. Ac-

cordingly, it authorizes other parties to participate in the proceedings to try to protect their interests and the value of the estate. It authorizes the creation of official committees to represent the creditors and the stockholders and gives them the right to challenge reorganization plans that are supported by management. It would surely be absurd for this Court to allow a state to deny an official committee the right to challenge the approval by the state commission of a rate agreement contained in a plan of reorganization, but if NUSCO's contention is right, the state would have that power.

The Bankruptcy Code also, however, recognizes that even management and the official committees together can not be fully relied on to protect the interests of all parties. It recognizes that the people on the committees may have real

conflicts of interest with some of the parties they are supposed to represent. It recognizes that collusion between management and the committees is quite possible and, therefore, gives all parties in interest and all individual stockholders the right to participate in the process to try to protect their interests and the value of the estate. And clearly, as this case demonstrates, if individual stockholders of a public utility do not have the right to challenge a rate decision approving a rate agreement embodied in a plan of reorganization, the federal policy reflected in those provisions will be frustrated.

NUSCO, PSNH and the State contend that RKR are really complaining about the confirmation of the Plan because it was confirmation of the Plan and not the approval of the Rate Agreement that determined the value of PSNH and therefore

RKR are in the wrong forum.

RKR are of course challenging the Confirmation Order in the federal courts. They have filed a notice of appeal with the District Court of New Hampshire to the Court of Appeals for the First Circuit and will pursue that appeal. But if RKR can not challenge approval by the PUC of the Rate Agreement at the Supreme Court of New Hampshire and in this Court, their appeal of the Confirmation Order may prove to be futile.

The PUC approval of the Rate Agreement pursuant to RSA 362-C is not conditioned on the confirmation order becoming a final order. RKR in its application for rehearing asked the PUC to so condition its order but it refused. App. E at 478a. RKR believe that if and when the Confirmation Order is reversed, the PUC's approval of the Rate Agreement will become a nullity as a matter of federal

law, but the State will surely disagree. But since the State might be right about that, RKR must be given standing to challenge approval of the Rate Agreement. Otherwise RKR might not have any possible remedy.

And given all that, it can not be seriously suggested that RKR's Petition does not present a substantial federal question.

II. RKR ARE APPROPRIATE PERSONS TO PETITION THE COURT.

The State suggests that this Court should deny the writ because RKR are not appropriate persons to challenge the rate decision even if other stockholders might be. It attempts to prejudice the Court against RKR by calling them "bottom fishers" who are simply trying to enhance the value of their own shares. The characterization is not accurate. RKR

purchased their stock over several years and have lost a substantial amount of money on their investments in PSNH. And RKR are not simply trying to enhance the value of their shares but the value of the estate for the benefit of all stockholders. But even if it were accurate, it would be no justification for denying RKR standing.

The State's contention, of course, is that it should not have to defend its actions against persons who bought stock only after the State had destroyed its value. But the State is not entitled to any such protection. The Bankruptcy Code makes no such distinction. Moreover, if the State were so protected, it would have inflicted even greater damage (the price would have dropped further) and would be even more likely to succeed. And other states in the future might be more likely to emulate the wrong.

Many states, of course, faced problems with nuclear power plants similar to New Hampshire's with Seabrook and considered bankruptcy for their utilities as a solution. But all the others backed away from the brink believing, rightly, that bankruptcy could only lead to higher unavoidable costs for the utility and therefore still higher rates in the long run for the consumer. New Hampshire stuck to its anti-CWIP law and went over. If RKR is not granted standing here, and for that reason can not successfully challenge confirmation of the Plan, the State will have managed to prove that bankruptcy is the way go.

The State also suggests that the Court should deny RKR standing because RKR hold only .5% of the stock and is attempting to substitute its judgement for the other 99.5% of the stockholders, but that assertion is false.

As stated in the Petition, RKR is now being supported financially by about 2000 stockholders holding about 1 million additional shares. And the record before the Bankruptcy Court shows that only about 53% of the common stockholders actually voted on the Plan and less than 40% affirmatively supported it. And surely many of those that voted for the Plan did so only because the Disclosure Statement, among other things, said that the PUC had essentially unfettered discretion to set just and reasonable rates and conveyed the distinct impression that there was no real alternative to the Plan. And surely many of those that opposed the Plan simply threw away their ballots in disgust for the same reasons. The Bankruptcy Court said the Code assumes that persons, who do not vote, do not care, and that may be a fair assumption in most bankruptcies, but

surely a failure to vote in response to the Disclosure Statement issued in this case more likely reflected disgust and rejection than indifference. ¹

¹After the Disclosure Statement was issued, RKR sent a two page letter to 2000 of the largest stockholders urging them to vote against the Plan and accompanied by a questionnaire asking them to tell RKR how they had voted and if they had voted prior to receiving the letter, how they would have voted if they had know of RKR's existence and position on the Plan beforehand. Before RKR could mail the letter, NUSCO obtained a temporary restraining order that delayed the mailing until very late in the voting period. Some stockholders did not in fact receive the letter until after the voting period had expired. About 735 stockholders returned the questionnaire

In sum, there is very good reason to believe that many stockholders in PSNH shared at the time of the vote, and share now, RKR's outrage at what has happened

and the returns indicated that a substantial percentage of stockholders that either voted for the Plan or did not vote at all would have voted against the Plan if they had known of RKR's existence and position beforehand. Indeed, the returns suggested that the stockholders would not have accepted the Plan if RKR had been able to send their letter to all of the stockholders prior to the vote. RKR offered the returns from the questionnaire into evidence during the confirmation hearing to show that despite the vote, the common stockholders were not at all happy with the Plan but the Bankruptcy Court rejected the offer as being irrelevant to any question then before it.

in this case.

III. IN THE INTEREST OF JUSTICE THIS COURT SHOULD NOW DETERMINE WHETHER THE STATE TOOK PSNH'S PROPERTY WITHOUT JUST COMPENSATION.

The State argues that even if the Court chooses to consider the issue of standing it can not properly consider at this time the question of whether the State by approving the rate agreement without regard to whether it enabled PSNH to recover its prudent investment in used and useful property took PSNH property without due process of law.

If the Court grants the writ only with respect to the standing issue and then decides after briefing some months hence that RKR does have standing the matter would have to go back to the court below for a decision on the merits. But since the court below has already said that the Constitution does not require anything in particular (as the State

repeats in its brief), RKR will in all likelihood have to return sometime hence to this Court for a decision on the merits without any advancement whatsoever of the issues that RKR is now presenting.

It is apparent that the State as well as the Supreme Court of New Hampshire need to be told in no uncertain terms what the law is in this area. This Court has made a clear distinction between methods used to set rates and the consequences of those methods, but the State as well as the Supreme Court simply ignore the distinction.

This Court should therefore take this opportunity to state very clearly that although it is not concerned about methods, it is very concerned about consequences and that it is particularly concerned about a "State's decision to arbitrarily switch back and forth between methodologies in a way which required

investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others . . . " Duquesne Light Co. v. Barasch 109 S. Ct. 609, 619 (1989).

It should, therefore, grant the writ so that it can hold in due course that when the State passed and then implemented RSA 362-C, it unacceptably switched methodologies from "prudent investment in used and useful facilities" to "consistent with the public good" and then it should direct the court below to render a decision on RKR's appeal consistent with that holding.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the writ in all respects.

Respectfully submitted,

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